

October 5, 2005

John McCowen
Ukiah City Council Member
[Address Redacted]
Ukiah, CA 95482-5400

Re: Your Request for Advice
Our File No. A-05-179

Dear Mr. McCowen:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Please note, the Commission will not advise with respect to past conduct. (Regulation 18329(b)(8)(A), copy enclosed.) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained herein apply only to prospective actions. Our advice is based on the facts presented in your request; the Commission does not act as a finder of fact when it provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. May you, as an owner of properties within the Downtown Parking and Business District and Benefit Zone, and the “Gateway” streets (Perkins and Gobbi streets), participate in decisions involving an urgency ordinance imposing a moratorium on “formula businesses” in that area of the city?
2. May you, as owner of properties in the affected area, participate in Ukiah Redevelopment Agency decisions regarding the development of a “form-based” approach to zoning for the Perkins Street “Gateway” and downtown area?
3. May you, as owner of properties within the redevelopment area, participate in Ukiah Redevelopment Agency decisions regarding an implementation plan that identifies agency activities and projects the agency may be considering during the next five years?

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

CONCLUSIONS

1. It is presumed that the financial effect of the governmental decision on your properties is material. Therefore, unless this presumption is rebutted or an exception applies, you are disqualified from participating in decisions regarding the decision to place a moratorium on formula businesses if it is reasonably foreseeable that the governmental decision will have *any* financial effect - even a penny's worth - on your real property.
2. You may not participate in decisions regarding the development of a "form-based" approach to zoning in the Perkins Street "Gateway" and downtown area because it is presumed that the financial effect of the governmental decision on your properties is material. Therefore, unless this presumption is rebutted or an exception applies, you are disqualified from participating in this decision.
3. You may not participate in decisions regarding the five-year implementation plan identifying future agency activities and projects because the financial effect of the governmental decisions on your properties is presumed to be material.

FACTS

You are a member of the Ukiah City council, and as such, you also serve as a member of the Ukiah Redevelopment Agency. You have an ownership interest in several properties within the city limits including: areas within the downtown Parking and Business District and Benefit Zone; along one of the "Gateway" streets leading into the downtown; and within the city's redevelopment district. You stated in a September 15, 2005 phone call that these districts have areas of overlap. For instance, the entire downtown Parking and Business District and Benefit Zone is within the city's redevelopment district. Every portion of Perkins and Gobbi Streets – the "Gateway" streets leading to downtown – are also within the city's redevelopment district. However, only part of Perkins Street and none of Gobbi Street is within the city's downtown Parking and Business District and Benefit Zone.

In a letter dated September 9, 2005, you included additional information regarding your property interests. These interests include:

(1) Property #1 on *Standley Street*, an 800 square foot commercial building located within the downtown Parking and Business District Benefit Zone, and 250 feet from Perkins Street. This property is currently used as an office/radio station;

(2) Property #2, #3 and #4 on *Waugh Lane*; and Property #5 *East Gobbi Street*; Two commercial parcels fully developed with a mix of residential and commercial uses, including a 900 square foot office/retail space which is currently used as an office. These

properties are located within the redevelopment district and are contiguous to Gobbi Street.

(3) Property #6 on *S. State Street*, a commercial parcel developed with legal non-conforming residential parcels located outside the city limits. This property is more than 500 feet from any of the areas in the city subject to a governmental decision.

(4) Property #7 on *W. Clay Street*, a residential rental unit that is within 200 feet from the redevelopment district, and more than 500 feet from the downtown area and gateway streets.

(5) Property #8 on *W. Clay Street*, a personal residence that is 200 feet from the redevelopment district, and more than 500 feet from the downtown area and gateway streets.

City Council and Ukiah Redevelopment Agency Decisions:

Moratorium on Formula Businesses:

The city council is considering regulating “formula businesses,” which are generally understood to include businesses with multiple stores, each of which is required to use and uses standardized logos, signage, store design, business processes, merchandise or a combination of these things. The city council discussion regarding issuing an urgency ordinance imposing a moratorium on formula businesses within the downtown business district and on “Gateway” streets, Perkins and Gobbi Streets, was placed on the agenda for discussion on July 20, 2005. You and another city council member recused yourselves from any discussion of the proposed moratorium on formula businesses. Further discussion regarding this item was postponed pending a determination regarding your possible conflict of interest in such a decision.

Prior to the July meeting, the issue was raised that you may have possible conflicts of interest based on your ownership of property *in the affected area*. In response, the city attorney prepared a memorandum dated July 19, 2005, which you included in your request for advice. The city attorney’s memorandum stated that less than 10% of the parcels in the city are located in the area of the proposed moratorium. Furthermore, the city attorney’s memorandum states that the decision to impose a moratorium requires a 4/5 vote of the city council and if two or more city council members are disqualified from voting on this measure, the city may not have a quorum.

Form-based Zoning:

It was also brought to your attention that you may also have a possible conflict of interest with regard to decisions before the Ukiah Redevelopment Agency involving the development of a “form-based” approach to zoning for the Perkins Street “Gateway” and Downtown area, which may include revisions to the 1992 Downtown Revitalization

Master Plan. You may have a conflict of interest because members of the city council also serve as members of the Ukiah Redevelopment Agency, and as the owner of property near the Redevelopment District and “Gateway” Streets, you own properties within areas that are the subject of a governmental decision. This item regarding “form-based” zoning, which was placed on the agenda for July 20, 2005, was continued without discussion. Ukiah currently uses conventional zoning, which involves traditional concerns such as land use and density. Form-based zoning seeks to regulate the form and appearance of buildings. It establishes standards for the aspects of development that a community may seek to emphasize – such as building height, size and shape, the building facades, the location of buildings, its proximity to the sidewalk and street, etc. Under such a plan, “emphasis is on creating a livable physical setting,” while the use of buildings is a secondary consideration.

On September 21, 2005, you left a message stating that the city council was going to discuss form-based zoning at that evening’s city council meeting. You stated you would not participate in the discussions since the issue was the subject of one the questions in your request for advice. You stated in your September 21, 2005 phone call that day, that you “owned property in the area that would be subject to form-based zoning, or would likely be subject to it so should the concept be approved.” Thus, these were tentative boundaries that could change.

Five-Year Implementation Plan:

The city’s Redevelopment Agency is also in the process of considering changes to its five-year implementation plan and future redevelopment projects. This plan outlines the history of agency activities and identifies all projects the agency may be considering during the next five-year period. The plan also must state how the proposed projects and expenditures eliminate blight. The purpose of the plan is to communicate to the public the goals and objectives of the agency and outline activities, obligations and potential expenditures of the redevelopment agency. During the plan’s life the agency may periodically identify necessary revisions to include projects which have not been previously considered or eliminate projects that the agency no longer wishes to pursue.

There are several new and on-going projects which the agency will be considering for inclusion in the updated implementation plan. They are as follows:

- **Circulation and Parking Studies:** These studies are not yet complete and projects which will be recommended have not yet been identified in their final form. Parking lot and streetscape improvements are included in the current plan. However, a more detailed description should be included once the specific projects are identified.
- **Downtown Revitalization:** The downtown revitalization has been a high priority for the agency since its inception. These projects include the Façade improvement program, street tree plantings, streetscape improvements, and design review. There will be more emphasis on projects in Main and State streets.

- **Ukiah Railroad Depot/MTA Transit Center:** Agency members have expressed their interest in working with the Northern California Rail Authority (NCRA) and Mendocino Transit Authority (MTA) toward development of the NCRA depot property, which has been a significant blighted area.
- **Housing Programs:** The implementation plan will also identify all potential housing projects or programs. The agency may identify specific infill or currently underdeveloped project sites for a major housing project.

The five-year implementation plan, which was on the agenda at the city council's June 15, 2005 meeting, was discussed briefly but also continued because it posed similar possible conflict-of-interest concerns.

ANALYSIS

Conflict-of-Interest Prohibition

Your questions implicate the Act's conflict-of-interest provisions which ensure that public officials "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Specifically, section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

A public official has a "financial interest" in a governmental decision within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; regulation 18700(a).) The Commission has adopted a standard eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).)

1. Are you a "public official"?

As a council member in the city of Ukiah, you are a "member, officer, employee or consultant of a state or local government agency" and are, therefore, a public official subject to the conflict-of-interest provisions of the Act. (Section 82048; regulation 18701(a).)

2. Will you be making, participating in making, or influencing a governmental decision?

The conflict-of-interest prohibition covers specific conduct: making, participating in making, or attempting to use one's official position to influence a governmental decision. (Section 87100; regulations 18702-18702.4.)

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, determines not to act because of a conflict, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.)

A public official “participates in making” a governmental decision when he or she, without significant substantive review, negotiates, advises, or makes recommendations regarding a decision. (Regulation 18702.2.)

A public official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.)

By deliberating, voting, committing your agency to a course of action, entering into any contractual agreement on behalf of the city – with regard to the proposed ordinance imposing a moratorium on “formula businesses,” the development of a plan for the Perkins Street “Gateway” and downtown area, or the five year implementation plan and future redevelopment agency projects – you will be engaging in activity regulated by the Act, unless an exception applies. (See regulation 18702.4.)²

3. What are your economic interests — the possible sources of a conflict of interest?

Section 87103 provides that a public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the official’s economic interests, described as follows:

- An economic interest in a *business entity* in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); regulation 18703.1(b));

² If a public official is enumerated in section 87200 (including city council members) and he or she has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in regulation 18702.5, subdivision (b)(1)(B), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in regulation 18702.5, subdivisions (c) and (d) apply. (§ 87105). Since you are a city council member, a position enumerated in Section 87200, these requirements apply to you.

- An economic interest in *real property* in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b); regulation 18703.2);
- An economic interest in any *source of income*, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); regulation 18703.3);
- An economic interest in any source of gifts to him or her if the gifts aggregate to \$360 or more within 12 months prior to the decision (Section 87103(e); regulation 18703.4).

In addition, a public official always has an economic interest in his or her personal finances, including those of his or her immediate family -- this is the “personal financial effects” rule (Section 87103; regulation 18703.5).

Economic interests disclosed in your request for assistance:

Real Property Interests:

You have disclosed the following *real property interests*: Property # 1 on W. Standley Street; Property #2, #3, #4 on Waugh Lane; Property #5 on East Gobbi Street; Property #6 on S. State Street; Property #7 on W. Clay Street; and Property #8 on W. Clay Street.

You have an economic interest in the above real properties provided that you have a direct or indirect interest of \$2,000 or more in each.

Investment Interests:

You have an economic interest in a business entity assuming you have an investment of \$2,000 or more in your commercial or other real property rental business.

Sources of Income:

Based on your facts, you have a number of different sources of income. Your commercial or real property rental business is a source of income if you received income in excess of \$500 per year from the business and/or if you are employed by the business. In addition, tenants of your real properties and clients from your business interests from whom you have received \$500 or more within 12 months of the governmental decision are considered sources of income under the Act.

Personal Finances: You also have an economic interest in your personal finances and those of your immediate family. (Section 87103; regulation 18703.5.) A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets or liabilities of the official or his or her

immediate family increasing or decreasing. This economic interest is implicated by virtue of effects on the stream of income you receive from the sources described above.

4. Are your economic interests directly or indirectly involved in the governmental decision?

Real Property Interests:

Regulation 18704.2(a) states that real property in which a public official has an economic interest is *directly* involved in a governmental decision if any of the following apply:

“(1) The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision....

(2) The governmental decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of the real property in which the official has an interest or a similar decision affecting the real property....

(3) The governmental decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of the real property in which the official has an interest.

(4) The governmental decision involves the imposition, repeal, or modification of any taxes or fees assessed or imposed on the real property in which the official has an interest.

(5) The governmental decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) or the redevelopment area.

(6) The decision involves *construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or improved services.*”

Subdivision (b) provides a number of *exceptions* to the provisions of subdivision (a). It states that real property in which the official has an interest is *indirectly involved* in a governmental decision if:

“(1) The decision solely concerns the *amendment of an existing zoning ordinance or other land use regulation* (such as *changes in the uses permitted*, or development standards applicable, within a particular zoning category) which is applicable to all other properties designated in that category, which shall be analyzed under 2 Cal. Code Regs. Section 18705.2(b).”

Decision #1: *Moratorium on “formula businesses”*

Directly Involved Properties: One of your properties – Property #1 on W. Standley Street – is located *within* the boundaries (or proposed boundaries) of the Parking and Business District Benefit Zone, the area subject to the governmental decision. Properties #2, #3, and #4 on Waugh Lane; Property #5 on East Gobbi Street are within 500 feet of the “Gateway” streets, areas subject to the governmental decision. Thus, all are considered “directly involved” absent an exception.

Subdivision (b) provides exceptions to the provisions of subdivision (a). Regulation 18704.2(b)(1) states that property is deemed *indirectly* involved if the decision “solely concerns the amendment of an existing zoning ordinance or other land use regulation (such as changes in the uses permitted, or development standards applicable, within a particular zoning category)...”

“It is fundamental cannon of statutory construction that exceptions are to be construed strictly and narrowly.” (*Ascarate* Advice Letter, No. A-04-012; citing *Deitsch* Advice Letter, No. A-02-129 quoting *Ticket Track California, Inc. v. Department of Motor Vehicles* (2002) 97 Cal.App.4th 1251; 119 Cal. Rptr. 2d 176.)

The zoning and land use decision you presented regarding the adoption of a moratorium on formula businesses do not appear to be “applicable to all other properties designated in that category,” but instead, are only applicable to the properties with that zoning designation within the downtown business district and “Gateway” streets. Thus, the exception under regulation 18704.2(b)(1) does not apply, and the above properties are deemed directly involved.

Decision #2: *Form-based zoning for the Perkins Street “Gateway” and Downtown area:*

Directly Involved Properties: One of your properties – Property #1 on W. Standley Street – is located in the downtown area, *within* the boundaries (or proposed boundaries) of the area subject to the governmental decision. (Regulation 18704.2(a)(1).) Properties #2, #3, and #4 on Waugh Lane; and Property #5 on East Gobbi Street are within 500 feet of Gobbi Street, a “Gateway” street subject to the governmental decision.

The exception set forth in subdivision (b)(1) does not apply because there is no existing ordinance or land use regulation subject to amendment. Thus the above properties are deemed directly involved.

Decision #3: *Five-year implementation Plan:*

Directly Involved Properties: You listed five properties within the redevelopment district, the area subject to the governmental decisions: Property #1 on W. Standley Street; Property #2, #3, and #4 on Waugh Lane; and Property #5 on East Gobbi Street. Two of your properties – Property #7 and #8 on W. Clay Street – are within 200 feet from the redevelopment district. Because of their location in, or proximity to, properties or areas that are the subject to the governmental decision, these properties are deemed directly involved. (Regulation 18702.4(a)(1).)

Sources of Income, Investment Interests, and Personal Financial Effects:

The facts you provided indicate that your various real property interests are directly involved in the above governmental decisions, and therefore would be subject to the “one-penny” rule with respect to disqualification. Because, absent an exception, the real property you own will result in a disqualifying conflict of interest, it is not necessary to discuss whether or not these economic interests form additional bases for your disqualification.

5. Applicable Materiality Standard

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official’s economic interests is material. (Regulation 18700(a).) Different standards apply to determine whether reasonably foreseeable financial effect on an economic interest will be material, depending on the nature of the economic interest and whether that interest is directly or indirectly involved in the agency’s decision.

Regulation 18705.2 (a)(1), provides that the financial effect of a governmental decision on real property which is directly involved in the governmental decision is *presumed to be material*. This presumption *may be rebutted* only by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the real property—even a penny’s worth.

6. Is it reasonably foreseeable that the financial effect of the governmental decision upon economic interests will meet the applicable materiality standard? (Does a conflict of interest result?)

An effect upon economic interests is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Regulation 18706(a).) A financial effect

need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Any financial effect of a governmental decision on real property that is *directly* involved in the governmental decision is presumed to be material. The Commission does not act as a finder of fact when providing assistance; this assistance is based solely on the facts you provide. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Decision #1: *Moratorium on “formula businesses”*

It is presumed that the financial effect of the governmental decision on your properties is material. You have provided no facts that would suggest the presumption can be rebutted. Therefore, unless this presumption is rebutted or an exception applies, you are disqualified from participating in decisions regarding the decision to place a moratorium on formula businesses if it is reasonably foreseeable that the governmental decision will have *any* financial effect - even a penny's worth - on Property #1 on W. Standley Street; Property #2, #3, and #4 on Waugh Lane; and Property #5 on East Gobbi Street.

Decision #2: *Form-based zoning for the Perkins Street “gateway” and Downtown area:*

It would appear that the purpose of this decision to select an alternative methodology for zoning is to enhance the value, appearance and livability of property in the project area, thus it is reasonably foreseeable that the governmental decision will have a material financial effect on your properties. However, this is a fact-based determination. Therefore, the determination of whether or not it is reasonably foreseeable that the applicable materiality standard will be met is necessarily a factual question that is ultimately for you to decide.

Decision #3: *Five-year implementation Plan:*

Directly Involved Properties: You listed five properties within the redevelopment district, the area subject to the governmental decisions: Property #1 on W. Standley Street; Property #2, #3, and #4 on Waugh Lane; and Property #5 on East Gobbi Street. Two of your properties – Property #7 and #8 on W. Clay Street – are within 200 feet from the redevelopment district. Because they are deemed directly involved, it is presumed the effect will be material.

Regulation 18709 (copy enclosed) deals with segmentation of decisions, which is a process to separate a decision in which an official has a disqualifying financial interest from another interlinked decision in which he or she may participate. You have not provided any facts to indicate that this provision applies therefore we do not further analyze it.

7. The “Public Generally” Exception

Even if a public official determines that his or her economic interest will experience a material financial effect as a result of a decision before the official, he or she may still participate if the “public generally” exception applies to the economic interest triggering the conflict of interest. (Regulation 18707(b)(4).) Regulation 18707.1 (copy enclosed) provides the requirements for the general exception. Regulation 18707.1, subdivision (a) establishes a two-part test for making this determination. Under this test, the material financial effect of a governmental decision on a public official’s economic interests is indistinguishable from its effect on the public generally if the decision affects a significant segment of the public generally and the governmental decision will financially affect the public official’s interest in substantially the same manner as it will affect the significant segment identified.

You have not provided any facts indicating that a significant segment of the public will be affected by the decisions. In addition, you own seven properties within the city of Ukiah. Therefore, you would not be affected in substantially the same manner as other property owners.

8. Legally Required Participation Exception

The “legally required participation” rule applies when the official’s participation in a governmental decision is legally required. (Section 87101; regulation 18708, copy enclosed.) You may wish to contact us for further advice if more than one city council member is disqualified from the above decisions, and the city is prevented from having a quorum.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

Enclosures

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